Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

HAROLD E. CARTER, WARDEN
Petitioner,

-vs-

DAVID B. CLINKSCALE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state criminal defendant exhausts a claim of trial counsel ineffectiveness when he raises that claim in his direct state appeal but the state appellate court, consistent with this Court's reasoning in *Massaro v. United States*, 538 U.S. 500 (2003), declines to rule on the claim because the appellate record is inadequate to allow a ruling on that claim.

2. Whether the state courts have sufficiently complied with the clear-and-express statement rule set forth in *Harris v. Reed*, 489 U.S. 255 (1989), when a state trial court denies a motion to excuse the procedural default, when the state appellate court affirms that denial, and when the federal appellate court concedes that the state courts did not reach the merits of the federal claim.

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Petitioner Harold E. Carter, Warden, hereby respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, which awarded habeas relief to respondent.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at *Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004). (See Appendix A) The Sixth Circuit's order denying rehearing is reported at 2004 U.S. App. Lexis 20699. (See Appendix D)

The district court's order and judgment are unreported. (See Appendix B) The magistrate's report and recommendation is also unreported. (See Appendix C)

These federal habeas rulings were based upon review of state appellate court rulings. The opinion of Ohio Court of Appeals, Tenth Appellate District, which affirmed respondent's convictions upon direct appeal is reported at 1999 Ohio App. Lexis 6453, 2000 WL 775607. The Ohio Supreme Court's order declining discretionary review can be found at *State v. Clinkscale*, 88 Ohio St. 3d 1482, 727 N.E.2d 1327 (2000).

The Ohio trial court later denied respondent's motion for leave to file a motion for new trial in an unreported decision. The Court of Appeals affirmed the denial of that motion in an unreported memorandum decision. The Ohio Supreme Court declined discretionary review at *State v. Clinkscale*, 93 Ohio St.3d 1497, 758 N.E.2d 1148 (2001).

JURISDICTIONAL STATEMENT

Review is sought of the opinion decided and judgment filed by the Sixth Circuit on July 8, 2004. After timely extension, petitioner filed a timely petition for rehearing and suggestion for rehearing en banc on July 29, 2004, which the

Sixth Circuit denied by order filed on September 17, 2004. This petition for writ of certiorari was timely filed within ninety days of the latter date.

Section 1254(1) of Title 28 of the United States Code confers jurisdiction on this Court to review the Sixth Circuit opinion and judgment.

STATUTORY PROVISIONS INVOLVED

Section 2254(b)(1) of Title 28 of the United States Code provides, in relevant part, as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
> (A)the applicant has exhausted the remedies available in the courts of the State; * * *

INTRODUCTION

Respondent Clinkscale has claimed that his two trial counsel were ineffective in failing to file a timely notice of alibi in the Ohio trial court. This untimeliness led the trial court to exclude the "alibi" evidence, and Clinkscale was convicted. Clinkscale raised the alibi/ineffectiveness claim on direct appeal, but the Ohio appellate court declined to rule on the issue, concluding that the appellate record was inadequate to allow a ruling. The Ohio Supreme Court thereafter declined discretionary review.

Despite the Ohio appellate court's ruling that the appellate record was inadequate, the Sixth Circuit majority

determined that presentation of the alibi/ineffectiveness claim in the direct appeal was enough to exhaust state court remedies. According to the Sixth Circuit majority, the alibi/ineffectiveness claim was exhausted because "Clinkscale raised his * * * claim on direct appeal, in which there were no special limitations on the ability of the Ohio Court of Appeals to reach the merits of that claim." *Clinkscale v. Carter*, 375 F.3d at 440. "Clinkscale could have asserted his ineffective assistance claim in a habeas petition filed in federal court as soon as the Ohio Supreme Court dismissed his petition for review of the Ohio Court of Appeals' denial of relief on direct appeal." *Id.* at 441.

The Sixth Circuit's ruling contradicts the reasoning behind this Court's decision just last year in *Massaro v. United States*, 538 U.S. 500 (2003). *Massaro* and other cases recognize that direct appeal is *rarely* an appropriate forum to litigate claims of trial counsel ineffectiveness. Indeed, the Sixth Circuit majority implicitly confirmed this very point elsewhere in its opinion. When the majority reached the merits of the alibi/ineffectiveness claim, it relied on *post-appeal* affidavits and *post-appeal* documentary evidence that had not been available to the state appellate courts in the direct appeal.

The Sixth Circuit majority opinion has done and will do serious injury to the interests of federal-state comity that underlay the exhaustion doctrine. "The exhaustion requirement serves AEDPA's goal of promoting comity, finality, and federalism, by giving state courts the first opportunity to review the claim, and to correct any constitutional violation in the first instance." *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (internal quotation marks,

brackets, and citation omitted). But mere presentation of a claim to the state courts is not enough. There must be "fair presentation" of the issue in the state courts such that the state courts have a fair opportunity to rule on the issue. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999).

Presenting a claim in the wrong procedural context does not constitute "fair presentation" for exhaustion purposes. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). The purposes behind the exhaustion requirement would be "frustrated were we to allow federal review to a prisoner who had *presented* his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

Under the Sixth Circuit's flawed logic, however, criminal defendants in the states comprising the Sixth Circuit will be allowed to "exhaust" by presenting their ineffectiveness claims in the inappropriate forum of a direct appeal, and the courts of these states will not be given a fair opportunity to address those claims before the case proceeds to federal habeas review. Since most post-conviction and federal habeas claims revolve around issues of trial counsel ineffectiveness, the Sixth Circuit decision will "unjustifiably undercut the considerations of federal-state comity that the exhaustion requirement seeks to promote." *Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct. 1347, 1351 (2004).

The Sixth Circuit decision also threatens federal-state comity because it amounts to "do as I say, not as I do." Relying on *Massaro*, the Sixth Circuit has correctly continued its practice of declining as a general matter to rule

on trial counsel ineffectiveness claims, thereby requiring such claims to proceed through federal post-conviction review. But when the Ohio appellate court used this very same approach, the Sixth Circuit penalized Ohio by concluding that state post-conviction review was not even necessary.

Beyond *Massaro*, a conflict exists between the Sixth Circuit's decision and the decisions of other federal habeas courts that have faced the same issue when state appellate courts decline to rule on ineffectiveness claims. Contrary to the Sixth Circuit's decision here, these courts have concluded that presentation of the claim in the direct appeal was not enough to exhaust and that the habeas petitioner must pursue state post-conviction review in order to exhaust. See Argument, Part I, at pp. 20-23, *infra*.

As an alternative ground for "exhaustion," Clinkscale will contend that he exhausted the alibi/ineffectiveness claim in later post-appeal state-court proceedings. In fact, the Sixth Circuit majority erred in this respect as well. Clinkscale demonstrated in the subsequent state-court proceedings that his claim was procedurally defaulted in those proceedings. Clinkscale filed a motion for leave to file an untimely motion for new trial, but the state trial court declined to excuse the untimeliness, thereby clearly and expressly enforcing the time bar. The state appellate court thereafter affirmed, thereby again clearly and expressly enforcing the procedural default. Even if the clear-and-express-statement rule applied, it was satisfied. See Argument, Part II, *infra*.

Because the Franklin County Prosecutor and Assistant Prosecutor believe that these issues, particularly the

first, carry such importance regarding the proper scope of state criminal appeals, they are filing the present petition for writ of certiorari after having obtained appointments as special counsel from the Ohio Attorney General.

STATEMENT OF THE CASE

Convicted on aggravated murder and other charges in October 1998, respondent Clinkscale claimed on direct appeal that his trial attorneys had been ineffective in filing an untimely notice of alibi, which resulted in the exclusion of "alibi" witnesses. In affirming defendant's convictions in December 1999, the Ohio Court of Appeals declined to rule on the issue, finding that the appellate record was inadequate for that purpose.

> In his third claim, defendant maintains that counsel were ineffective for not timely filing defendant's notice of alibi. As noted, counsel did clearly indicate that they were aware of the alibi witnesses before the disclosure deadline set forth in Crim.R. 12.1; however, *the record contains no explanation of the reason behind the late disclosure.* For example, the record does not disclose whether trial counsel failed to investigate or to interview defendant's alleged alibi witnesses. As a result, we are unable to reach a determination as to whether the delay was the result of trial strategy or was due to counsel's ineffectiveness as alleged. As *the reason for the late disclosure is not a part of the record* before this court, defendant must pursue his claim of ineffective assistance based upon the late disclosure *by way of a motion for postconviction relief.* (Emphasis added)

The Ohio Supreme Court declined discretionary review in April 2000. *State v. Clinkscale*, 88 Ohio St.3d 1482, 727 N.E.2d 1327 (2000).

Over ten months after the Ohio Court of Appeals advised respondent to pursue post-conviction relief, the defense in October 2000 filed a "motion for leave to file motion for new trial" pursuant to Oh.Crim.R. 33(B). The defense attached affidavits from the two trial attorneys, but neither of the trial attorneys conceded ineffectiveness, and one of the attorneys said that the "defense team made a strategic decision not to file a Notice of Alibi until we were sure that we could back it up with credible witnesses and corroboration."

Also attached to the motion for leave was the affidavit of a defense investigator regarding his investigation into the alibi and a copy of his investigative report dated October 3, 1998, which provided details of interviews with two "alibi" witnesses, Rhonda Clark and Bryan Fortner. The report also provided the details of an interview with Arthur Clinkscale, the defendant's father. The defense did not provide any affidavit from Clark or Fortner but did provide an affidavit from the father Clinkscale, whose claim that his son came home in Youngstown at around 5:45 a.m. or 6:00 a.m. could not provide an alibi to his son for the Columbus homicide occurring at approximately 3:45 a.m.

There are time limits for filing a motion for new trial in Ohio. Except for motions for new trial based on newly discovered evidence, a motion for new trial must be filed within fourteen days of the verdict(s). Oh.Crim.R. 33(B). Despite the 14-day time limit, Oh.Crim.R. 33(B) allows the

defendant to file a motion for leave to file a motion for new trial. Such motions involve a two-step process. In the first step, the trial court determines whether the defendant has shown by clear and convincing proof that the defendant was unavoidably prevented from filing the motion in a timely manner. If so, the trial court can grant the motion for leave, thereby excusing the untimeliness. Upon the granting of leave, the defendant must file his motion for new trial within seven days. *State v. Walden*, 19 Ohio App.3d 141, 146, 483 N.E.2d 859, 865 (1984).

In the present case, Clinkscale claimed unavoidable prevention because the trial attorneys could not be expected to argue their own ineffectiveness and because, although a new counsel had been appointed for the direct appeal, no counsel had been specially appointed to file a new-trial motion or post-conviction petition.

In December 2000, the Ohio trial court denied the motion for leave by noting that the motion for leave was "grossly out of rule" because it was filed over two years after the verdicts. The court further noted that "Defendant makes a naked assertion that he was unavoidably prevented from filing on time but offers no evidence to support such allegation." The court rejected defendant's argument that unavoidable prevention could be shown by lack of appointment of special counsel.

The trial court went on to say "a motion for a new trial is not intended to be a device used to second guess the appeals court." The trial court said it would be overruling itself and the Court of Appeals to grant leave.

Clinkscale appealed to the Ohio Court of Appeals, which, in a decision rendered in September 2001, affirmed the trial court's denial of the motion for leave to file an untimely motion for new trial. After quoting Oh.Crim.R 33(B), the court noted that defendant was required to show "unavoidable prevention" by clear and convincing proof. Relying on the 1984 appellate decision in *Walden*, the appellate court noted that "[a] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence."

Applying that definition of "unavoidable prevention," the Court of Appeals rejected Clinkscale's first assignment of error, which had challenged the trial court's denial of the motion for leave and/or the trial court's failure to hold an evidentiary hearing on the motion for leave.

> Here, the grounds underlying appellant's motion for new trial were known at the time the verdict was rendered. Moreover, as appellant concedes, these issues were already raised by appellant on direct appeal. As such, there was nothing to be resolved by an evidentiary hearing, and the trial court did not err in denying appellant's motion without such a hearing. Appellant's first assignment of error is overruled.

Clinkscale's second assignment of error raised various ineffective trial counsel claims, including the claim that counsel had been ineffective regarding the notice of alibi. The

Court of Appeals rejected that assignment of error as well, citing its resolution of the first assignment of error:

> In his second assignment of error, appellant raises a claim of ineffective assistance of trial counsel. Appellant concedes that these issues were previously raised on direct appeal, but purports to raise them again for purposes of preserving them for federal court review. Given appellant's concession in this regard and our resolution of appellant's first assignment of error, appellant's second assignment of error is not well-taken and is overruled.

The Ohio Supreme Court declined discretionary review in December 2001. *State v. Clinkscale*, 93 Ohio St.3d 1497, 758 N.E.2d 1148 (2001).

Meanwhile, Clinkscale had filed a federal habeas petition in April 2001 under 28 U.S.C. § 2254, raising the alibi/ineffectiveness claim and other claims. The warden's answer/return of writ contended that the alibi/ineffectiveness issue was procedurally defaulted because the Ohio Court of Appeals had correctly declined to rule on the issue on direct appeal and because Clinkscale had only sought state-court relief thereafter through a motion for leave to file a motion for new trial, which, the warden noted, was "egregiously late" and was denied for an "obvious procedural deficiency."

The magistrate issued a report and recommendation in June 2002, recommending that the habeas petition be denied. The magistrate disagreed with the warden's procedural default argument, but only on the narrow basis that the magistrate thought another procedural mechanism remained open to

Clinkscale, *i.e.*, a post-conviction petition under Ohio Revised Code Section 2953.21. Report and Recommendation, at 23-25. The magistrate conceded that there was only a "remote possibility" that the Ohio courts would entertain such an untimely petition. Nevertheless, the magistrate concluded that "Ohio law does not clearly foreclose consideration of a post-conviction petition" and that Clinkscale "still has a remedy in state court" if he files a post-conviction petition.

The magistrate rejected Clinkscale's claim that the alibi/ineffectiveness issue had been exhausted through the direct appeal. "The Ohio court of appeals stated in petitioner's direct appeal that this claim should be raised in a post-conviction petition. This court will not second guess the state court of appeal's decision that petitioner must pursue this claim in a post-conviction petition." Report and Recommendation, at 25 n. 2.

Notwithstanding the lack-of-exhaustion conclusion, the magistrate invoked 28 U.S.C. § 2254(b)(2) to reach the merits of the alibi/ineffectiveness claim. Section 2254(b)(2) allows a federal habeas court to *deny* a claim on the merits, notwithstanding the lack of exhaustion. Addressing the merits, the magistrate rejected the alibi/ineffectiveness claim, citing several concerns, including his view that the evidence would not have created a reasonable probability of a different outcome. *Id.* at 25-30.

Clinkscale filed objections to the report and recommendation, many of which took issue with the magistrate's merits analysis of the alibi/ineffectiveness claim. However, Clinkscale did not object to the magistrate's lack-of-exhaustion conclusion, nor did Clinkscale object to the

magistrate's invocation of Section 2254(b)(2), which only allowed the court to deny the claim.

The district court adopted the report and recommendation and denied the claim on the merits.

Upon Clinkscale's appeal, the warden reiterated the claim of procedural default. "At best, this claim is unexhausted, as the District Court found. At worst, it has been procedurally defaulted by Clinkscale's willful failure to pursue the post-conviction petition as instructed * * *." Warden's Brief, at 14.

The Sixth Circuit reversed and granted a conditional writ. 375 F.3d 420. It found that the direct appeal had been sufficient to exhaust the alibi/ineffectiveness claim. It found that, even regardless of the direct appeal, the claim was not procedurally defaulted because the state appellate court had not clearly and expressly relied on a procedural default in the motion-for-leave proceedings subsequent to the direct appeal. Finally, the Sixth Circuit determined that the alibi/ineffectiveness claim had merit, relying on affidavits and materials that were unavailable to the state appellate court in the direct appeal.

One of the judges concurred in part and dissented in part. 375 F.3d at 446 (McKeague, J.). The dissenter contended that further factual development was needed before a merits determination could be made. The dissenter also disagreed with the majority's analysis of exhaustion and procedural default and contended that those issues should be remanded as well. In regard to exhaustion on direct appeal, the dissenter stated that, "Where, as here, petitioner's fact-

based ineffective assistance claim was presented in a procedural context in which the merits were not considered because the factual record was incomplete, the claim can hardly be deemed to have been 'fairly presented.'" 375 F.3d at 449.

The warden's timely petition for rehearing and suggestion for rehearing en banc was denied on September 17, 2004. This timely petition for writ of certiorari follows.

ARGUMENT

I. Raising a claim of trial counsel ineffectiveness on direct appeal cannot be deemed "exhaustion of state remedies" for federal habeas corpus purposes when the state appellate court declines to rule on that claim due to an inadequate appellate record.

II. When a state trial court enforces a state procedural bar, when a state appellate court affirms the trial court's order enforcing that bar, and when the state courts do not reach the merits of the federal claim, then the state courts have sufficiently complied with the clear-and-express statement rule of *Harris v. Reed*, 489 U.S. 255 (1989).

Two significant errors warrant review by this Court. The first and most significant involves the Sixth Circuit's flawed assessment of the "exhaustion" issue, an assessment which conflicts with the decisions of other federal habeas courts and which conflicts with the reasoning of this Court's decision in *Massaro*. The second error involves the Sixth Circuit's failure to enforce a procedural default that the Ohio courts had clearly and expressly enforced. These flaws warrant

certiorari review and, if certiorari is granted, will eventually warrant reversal and remand for further proceedings in the Sixth Circuit.

I.

A state criminal defendant must exhaust his state court remedies before seeking federal habeas relief. As recently stated in *Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct. 1347, 1349 (2004):

> Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights. To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim. (Citations and some internal quotation marks omitted)

As further stated in *Castille v. Peoples*: "The exhaustion requirement * * * is grounded in principles of comity and reflects a desire to protect the state courts' role in the enforcement of federal law[.]" *Castille*, 489 U.S. at 349 (brackets added; citations and quotation marks omitted).

Even though the Ohio Court of Appeals had declined to rule on the alibi/ineffectiveness claim on direct appeal because the appellate record was inadequate, the Sixth Circuit majority concluded that presentation of that claim in the direct appeal

was *sufficient* to exhaust the claim in the state courts. The majority concluded that, although Clinkscale had filed a post-appeal motion for leave to file a motion for new trial, "that avenue of relief was *unnecessary* for purposes of exhausting his ineffective assistance of counsel claim." 375 F.3d at 438, 441 (emphasis added). The Sixth Circuit majority claimed that the alibi/ineffectiveness claim was exhausted because "Clinkscale raised his * * * claim on direct appeal, in which there were no special limitations on the ability of the Ohio Court of Appeals to reach the merits of that claim." *Id.* at 440. "Clinkscale could have asserted his ineffective assistance claim in a habeas petition filed in federal court as soon as the Ohio Supreme Court dismissed his petition for review of the Ohio Court of Appeals' denial of relief on direct appeal." *Id.* at 441.

Coming from appellate judges, these passages reflected a fundamental disconnect with a basic principle of appellate procedure. Appellate courts cannot simply grant relief on any issue at any time; rather, the appellate record must *support* the claim of error, and error will not be presumed.

In Ohio, error cannot be recognized on appeal unless the appellate record actually supports a finding of error. A defendant claiming error has the burden of proving that error by reference to matters in the appellate record. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384, 385 (1980). "[T]here must be sufficient basis *in the record* * * * upon which the court can *decide* that error." *Hungler v. Cincinnati*, 25 Ohio St.3d 338, 342, 496 N.E.2d 912, 915 (1986) (emphasis *sic*).

This requirement of appellate-record support is particularly applicable to claims of trial counsel

ineffectiveness, which must overcome a strong presumption of effectiveness. To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington*, 466 U.S. 668 (1984). There is a "strong presumption" that counsel acted within the wide range of reasonable professional assistance. *Id.* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955).

Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

A claim of trial counsel ineffectiveness usually will be unreviewable on appeal because the appellate record is inadequate to determine whether an omitted objection, motion, or defense really had merit and/or because the possible reasons for counsel's actions appear outside the appellate record. *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (*en banc*; "Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed."; "A factual record must be developed in and addressed by the district court in the first instance for effective review.").

Beyond Ohio's basic requirement of appellate-record support, the Sixth Circuit majority overlooked this Court's precedent that confirms the general unreviewability of

ineffective-counsel claims on direct appeal. In *Massaro v. United States, supra*, this Court concluded that a defendant need not raise a claim of trial counsel ineffectiveness on direct appeal in order to preserve it for collateral challenge under 28 U.S.C. § 2255. This Court reached that conclusion because it deemed review on direct appeal to be usually inadequate:

> The background for our discussion is the general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice. The procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments. We conclude that requiring a criminal defendant to bring ineffective-assistance-of-counsel claims on direct appeal does not promote these objectives.
>
> As Judge Easterbrook has noted, "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time." Applying the usual procedural-default rule to ineffective-assistance claims would have the opposite effect, creating the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim. Furthermore, *the issue would be raised for the first time in a forum not best suited to assess those facts.* This is so *even if the record contains some indication of deficiencies* in counsel's

> performance. The better-reasoned approach is to permit ineffective-assistance claims to be brought in the first instance in a timely motion in the district court under § 2255. We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.

Massaro, 538 U.S. at 504 (emphasis added; citations omitted).

The *Massaro* decision emphasized the general unreviewability of such claims on direct appeal:

> In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance. When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under *Strickland* * * *, a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the

> action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. * * * The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced. Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Massaro, 538 U.S. at 504-505 (some citations omitted). "No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did * * *." *Id.* (quoting Easterbrook, J.)

Massaro recognized that the *trial court* is "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Id.* at 505. Review on direct appeal "in most instances, will produce no benefit." *Id.* at 507. "[F]ew such claims will be capable of resolution on direct appeal * * *." *Id.* It will be "the rare claim that could have been raised on direct appeal * * *." *Id.* (quoting Easterbrook, J.).

The widespread acceptance of the *Massaro* principle is demonstrated by the Sixth Circuit's very own case law. The Sixth Circuit had followed the rule of general unreviewability even prior to *Massaro*. See, *e.g.*, *United*

States v. Aguwa, 123 F.3d 418, 422 (6th Cir. 1997) ("best brought in a post-conviction proceeding"); *United States v. Goodlett*, 3 F.3d 976, 980 (6th Cir. 1993). The Sixth Circuit has followed *Massaro* this year as well. *United States v. DeJohn*, 368 F.3d 533, 548 (6th Cir. 2004) ("[n]ormally, an appellate court does not consider ineffectiveness of counsel on direct appeal, as the record of a defendant's counsel's performance is not fully developed * * *."); *United States v. Foster*, 376 F.3d 577, 593 (6th Cir. 2004).

Under similar circumstances, other federal habeas courts addressing state convictions have found a lack of exhaustion. In *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003), the Nebraska Court of Appeals had declined to rule on three claims of trial counsel ineffectiveness because the record on direct appeal was inadequate. Moreover, the prisoner had not pursued one full round of post-conviction review in the Nebraska courts. The Eighth Circuit affirmed the district court's conclusion that the prisoner had not exhausted his state remedies.

In *Mercado v. Senkowski*, 736 F. Supp. 28 (E.D.N.Y. 1990), the prisoner had raised a claim of trial counsel ineffectiveness in his direct appeal in the New York Appellate Division, but he did not pursue discretionary review in New York's highest court, and he did not seek post-conviction review. After rejecting the warden's procedural default argument, the district court concluded that the issue remained unexhausted. "The Appellate Division never had a fair opportunity to address this critical facet of the ineffective assistance of counsel claim solely by reviewing the trial record." *Id.* at 29. The court concluded that it had been "impossible for the New York Appellate

Division to resolve this claim because his argument was dependent on facts outside the record." *Id.* The district court further stated, as follows:

> It does not matter that the ineffective assistance of counsel issue had been raised, though in a seemingly cursory fashion, on direct appeal because the mere presentation of the ineffective assistance of counsel issue on direct appeal does not create a fair opportunity for decision, and consequently does not authorize petitioner to proceed to federal court without seeking a state post-conviction remedy.

Id. (quotation marks and brackets omitted).

To the same effect is *United States ex rel. LaSalle v. Smith*, 632 F. Supp. 602 (E.D.N.Y. 1986), where the district court likewise dismissed a habeas petition for lack of exhaustion. The court concluded that raising the ineffectiveness claim in the direct appeal "was simply the wrong remedy given the nature of his claim" and that the appropriate vehicle for review was post-conviction review.

In *Reyes v. Philips*, 2003 U.S. Dist. Lexis 52, 2003 WL 42009 (S.D.N.Y. 2003), the New York Appellate Division had declined to rule on a claim of trial counsel ineffectiveness that was based on facts outside the appellate record, and the prisoner had not pursued post-conviction relief. The district court concluded that the claim was unexhausted:

> To exhaust an ineffective assistance of counsel claim, all allegations must be presented to the state court

> through an appropriate procedural vehicle, thus allowing the court to examine all of the circumstances and cumulative effect of the claims. * * * A [state post-conviction] motion, rather than a direct appeal relying only on the trial transcript, allows a complete factual record to be developed regarding a counsel's tactical decisions, which in turn gives state courts the opportunity to review the merits of the Sixth Amendment claim as a whole. * * *

The same conclusion was reached in *Ledesma v. Cunningham*, 2003 U.S. Dist. Lexis 14992, 2003 WL 22047147 (S.D.N.Y. 2003), where the court concluded there was a failure to exhaust because the Appellate Division had declined to rule on a claim due to an inadequate record and therefore "was not able to rule fully on the merits of the claim."

While other habeas cases are less on point, such cases confirm that mere presentation of a claim of trial counsel ineffectiveness on direct appeal will not constitute exhaustion when the appellate record was inadequate. *Cruz v. Warden*, 907 F.2d 665, 668 (7th Cir. 1990) (even if failure-to-prepare claim had been raised on appeal, the appellate court could not have addressed it; "without the necessary facts on record, we cannot say that the failure to prepare claim was 'fairly presented' to the appellate court."); *Gornick v. Greer*, 819 F.2d 160, 161 (7th Cir. 1987) ("ineffective assistance of counsel claims often involve facts outside the record and therefore such claims can usually be raised in an Illinois post-conviction proceeding.").

The foregoing case law, including *Massaro*, recognizes that in rare cases the appellate record can be sufficient to allow full review of the ineffectiveness claim on direct appeal. But the Sixth Circuit majority did not invoke the "rare case" exception. It did not say that the Ohio Court of Appeals had erred in saying the record was inadequate on direct appeal. Instead, the Sixth Circuit ignored the question of whether the appellate record was adequate and concluded that presentation of the issue on direct appeal qualified as "exhaustion."

Much of the majority opinion supports the view that the appellate record was insufficient to allow full review on direct appeal. The majority relied heavily on affidavits and the defense investigator's report in concluding that there had been ineffectiveness, see 375 F.3d at 443-45, but the Ohio Court of Appeals had not had access to those materials in the direct appeal. The direct appeal was decided in December 1999, and the defense did not supply those materials to the Ohio courts until it filed the motion for leave to file a motion for new trial over ten months later in October 2000. The Ohio Court of Appeals simply could not have reviewed these materials on direct appeal.

Even if the original appellate record had come to contain these materials, resolution of the issue would have been inappropriate on direct appeal. The materials consist of assertions made by defense attorneys, a defense investigator, and "alibi" witnesses who are the father, friend, and girlfriend of Clinkscale. This "alibi" evidence had not been tested through cross-examination or through adversarial hearing. Moreover, since a claim of trial counsel ineffectiveness waives attorney-client privilege, it would

have been important to determine through other defense documents or information whether these materials were a *full* portrayal of the "alibi" claim, rather than a self-serving, incomplete portrayal that would have fallen apart at trial. The late disclosure itself suggested a lack of confidence in the "alibi" evidence, which, again, warranted an adversarial inquiry into the *bona fides* of the "alibi" before a new trial was awarded. Accepting these untested materials on direct appeal would have been naïve and would have deprived the prosecution of the opportunity to test the credibility of the attorneys, the investigator, and the "alibi" evidence.

As the Ohio Supreme Court has recognized, the defense decision not to comply with the alibi notice requirement sometimes is "an intended, self-serving trial tactic," designed to deprive the prosecution of a fair trial. *State v. Smith*, 17 Ohio St.3d 98, 101, 477 N.E.2d 1128, 1131 (1985). Equally so, untested defense materials, considered without cross-examination and without adversarial testing on direct appeal, would deprive the prosecution of a fair appeal.

It is not automatic ineffective assistance for a defense counsel to delay filing a notice of alibi. The Sixth Circuit majority erred when it said that "there would have been nothing to lose" by filing a notice of alibi. 375 F.3d at 443. In fact, filing a notice of alibi can have a cost. A notice of alibi is also an admission by a party-opponent, and some Ohio case law indicates that the prosecution can introduce the notice of alibi in order to impeach the defense evidence. *State v. Billups*, 68 Ohio App.3d 248, 260-61, 588 N.E.2d 208, 217 (1990) (Whiteside & Bryant, JJ., concurring – evidence as to changes in alibi can be introduced through notices of alibi themselves); *State v. Haynes*, Ohio 9th Dist.

No. 13258, 1988 Ohio App. Lexis 787, 1988 WL 29814 (1988) ("The contradiction between the notices of alibi and the letter and the actual testimony at trial was a proper subject of inquiry."). The notice of alibi ties the defense into a particular theory of the case, and the defense therefore loses the freedom to pursue other possible theories. Needless to say, it would be damaging for the defense to claim an alibi before trial but then claim some other defense at trial. This is why trial counsel Rogers was close to the mark when he said in his affidavit in 2000 that he will not file a notice of alibi until he is certain he has the witnesses available to back it up. The Ohio Court of Appeals correctly declined to rule on the alibi/ineffectiveness claim on direct appeal.

II.

Since the direct appeal cannot be considered to constitute exhaustion, the issue becomes whether the claim was exhausted through the process of filing a motion for leave to file a motion for new trial. Some type of post-conviction review *was* necessary in order to exhaust.

The problem was, and continues to be, that a procedural bar prevented state-court review. The time limit for seeking a new trial expired fourteen days after the verdicts, *i.e.*, in late 1998. But the Sixth Circuit majority refused to recognize the procedural default, since it concluded that the Ohio Court of Appeals had not clearly and expressly stated that its judgment rested on the procedural default of untimeliness. The majority, and also the dissenter, found the decision of the Ohio Court of Appeals to be

ambiguous, with the majority saying "It is unclear on what ground, or grounds, the court's judgment rested." 375 F.3d at 442.

This claim of ambiguity overlooked the narrow procedural posture in which the case came to the Ohio Court of Appeals. It bears repeating that pursuing an untimely motion for new trial is a two-step process, with the first step being whether the defense has shown unavoidable prevention in order to obtain leave to file the motion for new trial. If granted leave, then, and only then, does the defense file its motion for new trial, at which point, then, and only then, could claims of trial error be reviewed on their merits. *Walden, supra*; Oh.Crim.R. 33(B).

The Ohio trial court had not allowed the proceeding to get past the first step. The trial court found that the motion was "grossly out of rule," rejected the defense efforts to claim "unavoidable prevention," and denied the *motion for leave*. The defense efforts had failed at the threshold of untimeliness and procedural default.

The case remained in that narrow procedural posture when it reached the Ohio Court of Appeals. The Court of Appeals could not review the merits because it concluded that the trial court had acted correctly in denying the motion for leave. Understood in this procedural posture, the Ohio Court of Appeals was clearly and expressly resting its judgment on the procedural bar. It was *affirming* the trial court's decision to enforce the procedural bar. It quoted the very language of the procedural bar from Oh.Crim.R. 33(B), and it summarized the standard for "unavoidable prevention,"

which requires a showing that the defendant neither knew nor should have known of the ground for new trial. The court then said:

> Here, the grounds underlying appellant's motion for new trial *were known* at the time the verdict was rendered. Moreover, as appellant concedes, these issues were *already raised* by appellant on direct appeal. As such, there was nothing to be resolved by an evidentiary hearing, and the trial court did not err in denying appellant's motion without such a hearing. Appellant's first assignment of error is overruled. (Emphasis added)

This paragraph shows a clear reliance on the procedural bar. The motion was untimely, and the defendant could not show unavoidable prevention because the defendant was aware of the potential alibi/ineffectiveness ground for new trial at the time of verdict and thereafter during the direct appeal. The first assignment of error had challenged the trial court's refusal to grant leave, but the Court of Appeals overruled that assignment of error and thereby affirmed the trial court's enforcement of the procedural bar. The Sixth Circuit should have considered the "surrounding circumstances" and the disposition reached by the Ohio Court of Appeals, which had affirmed the trial court's enforcement of the procedural bar. See *Ylst v. Nunnemaker*, 501 U.S. 797, 802 (1991).

The Sixth Circuit majority seemed to be saying that Ohio Court of Appeals may have reached beyond the procedural bar. The majority quoted and italicized various passages from the second appellate decision in an effort to find an ambiguity. 375 F.3d at 441-443. But, whatever

reaching beyond this procedural bar occurred, the Sixth Circuit conceded that the state appellate court had not reached the merits of the alibi/ineffectiveness claim. The Sixth Circuit conceded that "no state court has adjudicated the merits of Clinkscale's ineffective assistance claim." 375 F.3d at 436.

Since the Ohio courts did not reach the merits of the federal claim, the issue of whether the Ohio courts clearly and expressly relied on a state procedural bar was entirely inapplicable. As this Court stated in *Coleman v. Thompson*, 501 U.S. 722, 735 (1991), "[a] predicate to the application of the *Harris* presumption is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law." The Sixth Circuit here conceded that the state courts did not reach the merits alibi/ineffectiveness issue, thereby showing that the state court decision did not rest primarily on federal law and was not interwoven with federal law. See *Ylst*, 501 U.S. at 801 ("If the last state court to be presented with a particular federal claim *reaches the merits*, it removes any bar to federal-court review that might otherwise have been available."; emphasis added).

In the final analysis, once it affirmed the denial of the motion for leave, the Ohio Court of Appeals could not have legitimately reached the merits of the alibi/ineffectiveness claim, and the Sixth Circuit agreed that it did not do so.

In response to the warden's procedural-default argument in the Sixth Circuit, Clinkscale contended in his reply brief that the warden waived the issue by failing to object to the

magistrate's report and recommendation. The magistrate rejected "procedural default" on grounds of a still-existing state remedy. But, notably, the Sixth Circuit majority did not rely on a waiver theory and instead rejected procedural default on other grounds.

Clinkscale's waiver argument at best is a double-edged sword, since the lack-of-objection argument cuts against Clinkscale more significantly. The magistrate rejected procedural default only on the narrow ground that the alibi/ineffectiveness claim remained unexhausted. The magistrate specifically rejected Clinkscale's claim that the claim had been exhausted in the direct appeal. These were significant lack-of-exhaustion conclusions, but Clinkscale did not object to them, nor did Clinkscale object to the magistrate's invocation of 28 U.S.C. § 2254(b)(2), which allows a federal court to disregard lack of exhaustion only to *deny* the unexhausted claim on the merits.

The Sixth Circuit majority having disregarded Section 2254(b)(2) in Clinkscale's favor, Clinkscale would be in no position to insist on a waiver theory now. If the Sixth Circuit had applied such a waiver analysis, and if it had done so in an evenhanded way, it would not have granted relief in violation of Section 2254(b)(2) on the basis of what the magistrate determined to be an unexhausted claim.

CONCLUSION

In light of the foregoing, petitioner respectfully requests that this Court grant the petition for writ of certiorari. Upon this Court's granting of certiorari, and upon eventual reversal of the Sixth Circuit opinion, petitioner would request that this Court remand the case so that the Sixth Circuit can determine whether "cause and prejudice" or a "fundamental miscarriage of justice" excuse the procedural default and/or whether Clinkscale's other habeas claims warrant relief.

Respectfully submitted,

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